ADVANTAGES OF THE JURY SYSTEM.

It is no part of our present purpose to re-state or review the historical argument in favor of this institution. To do so would be to tell over again the well-worn and familiar story of every struggle for constitutional and civil liberty in England. The American colonists brought with them to this country a devoted attachment to it. The first English lawyer who resided in Massachusetts, Lechford, writing in 1641, notices that "matters of debt, trespas and upon the case yea and of heresie also are tryed by a jury," who "may find a generall verdict if they please."

In the Declaration of Independence one of the prominent grievances alleged against King George III. was his "giving his assent to acts of pretended legislation . . . for depriving us, in many cases, of the benefits of trial by jury." The Constitution of the United States guaranteed trial by jury in criminal cases. And the amendments proposed at the first session of the first Congress, upon the recommendation of John Adams in the Massachusetts Convention, secured the same privilege in civil cases also — in the language of Judge Story, thus placing "upon the high ground of constitutional right the inestimable privilege of trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." These articles are held to apply only to the federal courts. But the constitution of every one of the several States is believed to contain similar and equally extensive provisions.

De Tocqueville says:

"When the English adopted trial by jury they were a semi-barbarous people. They are become, in course of time, one of the most enlightened nations of the earth; and their attachment to this institution seems to have increased with their increasing civilization. They soon spread beyond their insular boundaries to every corner of the habitable globe; some have formed

colonies, others independent states; the mother-country has maintained its monarchical constitution; many of its offspring have founded powerful republics; but wherever the English have been, they have boasted of the privilege of trial by jury. They have established it, or hastened to re-establish it, in all their settlements. A judicial institution which obtains the suffrages of a great people for so long a series of ages, which is zealously renewed at every epoch of civilization, in all the climates of the earth, and under every form of human government, cannot be contrary to the spirit of justice."

For some years past there has been a disposition and tendency to disparage and undervalue trial by jury, until to many minds this glowing eulogium may seem the language of exaggeration. Our immediate object is to point out some of the leading beneficial features of this mode of trial. The words import an open and public trial before a body of twelve impartial men, temporarily selected from the mass of their fellow-citizens, and presided over by a magistrate; their function is, under his direction, to determine by a unanimous verdict, in civil causes, such issues of fact as are submitted by the court to their decision; in criminal trials, to find the guilt or innocence of the accused by a general verdict of guilty or not guilty.

The presiding judge possesses the discretionary power to set aside any verdict, and grant a new trial before another jury, in all cases except where a verdict of not guilty has been returned upon a criminal charge. That the number of the jury must be twelve, and that their verdict must be unanimous, are believed to be indispensable requirements, incapable of being changed by ordinary legislation in cases within the scope of the constitutional guaranties. There is no magic in the number twelve—but it is the number of which a jury has been composed for many centuries, and no adequate or even plausible reason can be assigned for either increasing or diminishing it. The requirement of unanimity in a verdict has been much criticised, and a considerable array of names is opposed to it, on the ground that the disagreements thereby caused greatly increase the expenses of litigation, and frequently result in a failure of justice. On the other hand, the advocates of the ancient and existing rule that twelve minds shall concur in any result which subjects a man to punishment, or to loss of property, or to a money judgment against him, point to the experience of ages, as showing the satisfactory workings of the rule; and insist especially upon the great value of giving to each juryman a veto power which insures for his opinions and arguments a fair

consideration in the deliberations of the jury-room. They deny that disagreements are numerous in proportion to the number of trials, and claim that they occur chiefly in cases of so much difficulty, doubt, and perplexity, that a second trial is not undesirable. The question is one upon which a difference of opinion may well exist. The writer agrees with those who are in favor of maintaining the existing requirement of unanimity, especially because he believes that the people would never be contented to have a citizen punished or deprived of important personal or property rights upon a majority verdict, and that the constitutional alterations necessary to change the rule are practically unattainable.

The number of disagreements in proportion to the whole number of jury trials is not large. Sometimes a disagreement is nearly equivalent to the Scotch verdict of not proven, leaving the defendant unconvicted, but without exoneration of character—a result occasionally desirable, as in cases where the chief object of public interest in the trial is to expose a wolf in sheep's clothing, and to lessen or destroy his power of mischief and evil. In other instances, a case may have been imperfectly prepared and tried, and a disagreement may lead to a more thorough trial and more satisfactory result. As we write, the trial of the Star Route conspirators has come to an extraordinary termination, the jury disagreeing as to the guilt of the chief actors and finding two subordinates guilty, the verdict against whom has been promptly set aside by the presiding judge. The city of Washington is probably the most unfavorable place in the country to illustrate trial by jury, or any other feature of its government or popular sovereignty. It may be desirable to make use, there, of the expedient already adopted in some parts of this country, and long employed in England, of having special or struck juries, thereby obtaining men of a higher grade of character and intelligence than the common average. And it is always an essential duty of counsel to scrutinize the panel in advance, so as to get rid of objectionable jurymen by challenge, either peremptory or for cause. If the newspaper reports can be trusted, it would seem that the peremptory challenge of one juryman in the Star Route trial might have prevented this ignominious failure, and that enough might have been learned in advance of that man's history to have induced the prosecuting counsel to set him aside. But the end is not yet.

It is too early to criticise this case intelligently. Perhaps hereafter it may stand, like the prosecution of Tweed in New York, a monument of the triumph of justice in the conviction, before a jury, of great criminals accused of a crime notoriously difficult to prove, and committed under circumstances exceedingly favorable for eluding detection.

In every jury trial the duties of the presiding judge are of the most important character. He decides conclusively what evidence shall be received and what rejected; he determines the questions to be passed upon by the panel. At the close of the trial he charges the jury; that is, informs them of the nature and limitations of their duties, recapitulates more or less fully the material evidence, points out distinctly and exactly what are the rules of law by which they are to be governed. In all civil causes the jury are bound to follow his directions as to the law. In criminal trials their right to return a general verdict necessarily involves the power, and, as the writer believes, the rightful power, in favor of the accused, to disregard the judge's instructions, if they deem it their duty to take such a grave responsibility, and to find the verdict according to their own best understanding, judgment, and conscience, though in direct opposition to the direction of the court. This last proposition, however, is one upon which courts, jurists, and statesmen differ widely. Whoever desires to study the question will find abundant material easily accessible. We will refer only to Commonwealth *vs.* Anthes, 5 Gray, 185, to a very learned and exhaustive note on the powers and rights of juries, at the end of "Quincy's Reports," by Horace Gray, lately Chief Justice of Massachusetts, now one of the judges of the Supreme Court of the United States, and to an article in the "Westminster Review" for October, 1827. Those who believe that such an exercise of power by the jury is not a mere usurpation, tolerated because it cannot be prevented, but a sacred constitutional right, to be resorted to in extreme cases for the preservation of liberty, do not deny that ordinarily the safe, prudent, and only proper course for the jury, in criminal as well as civil trials, is to accept and follow implicitly the instructions of the court upon the law.

There can be no such thing as a good jury trial without the coöperation of a learned, upright, conscientious, and efficient presiding judge. It has been our lot to witness trials where the judge was a mere King Log, who sat silent and inscrutable, con-

fining himself to mumbling out rulings on such points as he could not evade passing upon, charging the jury as briefly as possible, merely upon the law, and seeming wholly indifferent whether their verdict was to be just or unjust, in conformity with or against the evidence. We have also witnessed with delight the grand spectacle of great magistrates anxiously and admirably performing their whole duty in the trial of important causes before juries, not infringing upon the province of the latter, but holding firmly and steadily the reins, and guiding the entire proceedings, determined to prevent, if possible, any miscarriage of justice. It is idle to expect the best, or even decent results, from jury trials, if weak, vacillating, timid, incapable judges are to preside. Many of the criticisms leveled against juries would be better directed against systems which, by inadequate compensation and insecure tenure of office, degrade the judiciary.

As to the intelligence and character of jurymen, the very nature of the institution renders it inevitable that they should not, in these respects, rise above the average level of their fellow-citizens. They will fairly represent that average, unless there is some departure from proper rules in the method of their selection. Complaints of the inferior intelligence and unfitness of jurymen are principally confined to great cities — supposed to be the centers of civilization, but in truth the places where it is always most difficult to preserve free institutions in their purity and efficiency. In our opinion, the chief difficulty is not with the dangerous classes, or in the extension of citizenship to the ignorant; but in the apathy and indifference to their political duties so general among the more intelligent and respectable classes. The obligation to serve upon a jury is undoubtedly a serious burden to any man actively engaged in business, whose time and faculties are engrossed in the pursuit of wealth; to the city idler who lounges in his club, sneering at and decrying republican institutions, it is considered merely as a bore and nuisance. But the conscientious and patriotic citizen, who means to do his share of the work of the community in which he lives, will regard it as a sacred duty. It is not long since we were told, in a New York journal, of systematic arrangements by which bribes are given and received to secure exemption from jury service; and the writer has known men of general respectability, and more than ordinary conscientiousness, to avow un-

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blushingly that they have been in the habit of paying money annually to keep their names off the jury list. It is hard to say whether such a transaction is more disgraceful to the official who levies the blackmail, or to the citizen who is so destitute of public spirit as to be willing to pay it. Fortunately, such things are possible in only a few places. It is conceded that the juries of the federal courts, even in New York city, are satisfactory. And by proper regulations properly executed, the character of juries in other courts can easily be raised to the same level. Indeed, it may be doubted whether the unfavorable accounts given of common juries there are not sensational and exaggerated. At all events, we appeal confidently to the experience of those most conversant with the practical administration of justice throughout the country to-day, whether the average intelligence of juries does not almost everywhere fairly represent that of the mass of their fellow-citizens in their respective localities. Wherever there exists a necessity for jurors of higher general intelligence than the average of the community, to try difficult or peculiar cases, or in consequence of a low grade of intelligence among the great body of citizens, the simple expedient of special or struck juries, already referred to, may be resorted to by legislation. It is understood to work well wherever already adopted in this country, and its advantages in England are universally acknowledged. Lord Mansfield, the founder of the commercial law of England, is said by Lord Campbell to have reared a body of special jurymen at Guildhall, who were generally returned in all commercial causes to be tried there. "He learned from them the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided."

How far juries are exposed to corrupt influences is another question. If they are frequently bribed, it must of course be done not only with the connivance, but by the active procurement of lawyers engaged in trials before them. In the course of more than thirty years' experience at the bar of Massachusetts, the writer has never known an authentic case of a verdict or even a disagreement secured by corruption. Only a very few instances of attempted bribery have come to his knowledge, and he can recall the name of only one advocate even suspected of trying to operate as "a jury-fixer." The writer in the journal to which reference has been made, gives a graphic account of the futile attempt to bribe the jury that convicted Tweed.

The moral to be drawn from the story seems to be that the conspiracies of evil men can be defeated by the vigilance of good men. We believe that the exercise of corrupt influences over either judges or jurymen, directly or indirectly, is extremely rare. And we protest against the line of argument which seeks to condemn any political institution, because of its liability, under unfavorable circumstances, to occasional abuses. No piece of machinery, however perfect in theory and construction, will work even tolerably well if built of unsuitable or defective materials. Whoever assails any existing system must be prepared not only to point out its imperfections, but to propose in its stead some substitute of greater merits or less objectionable. It is, therefore, incumbent upon the opponents of trial by jury to state specifically what method of trial they wish to introduce in its place. We venture to affirm that they can offer no new-fangled contrivance that will not prove, upon examination, more vulnerable in principle and in its details, than the venerable institution they would displace.

The proportion of trials before a jury in civil causes to the whole number which are litigated has diminished considerably within a few years past.

For this there are several causes. The beneficial and enlightened alterations in the law of evidence, by which witnesses are no longer disqualified by interest, and parties to the suit can be examined upon interrogatories before the trial, and can appear as witnesses on their own behalf, and be placed upon the witness stand by their adversaries, have reduced controversies upon facts to those cases in which there is a substantial issue of fact to be tried. It is no longer possible, as sometimes happened a generation ago, to have a long trial proceed upon a false issue—a matter about which the plaintiff and defendant, if talking together in the absence of witnesses, would have had no disagreement. The pressure caused by the vastly increased volume of business has rendered courts less disposed to tolerate, and lawyers less inclined to indulge in, an unnecessary waste of time and breath. The Sergeants Buzfuz of the bar are much less important personages in the profession and before the community than they were a generation ago. Sonorous metal, sending forth a martial sound, has lost much of its market value in the law.

The reformation of equity pleading and procedure has greatly lessened the delays and expensiveness which were once a reproach

to that department of jurisprudence. Its principles are better understood by the bar and by judges; its excellence as a system of remedial justice is better appreciated; and it has attracted to its side of the courts a vast mass of litigation formerly disposed of on the common-law side before juries.

The statutes permitting parties to waive a jury and to have questions of fact determined by the trial-judge, which frequently require this course to be pursued unless one party or the other demands a jury trial by a prescribed time, have likewise much diminished the number of jury trials. But, after taking all these things into account, there remain an immense number of cases in which one or both parties insist upon the privilege.

A jury trial is necessarily a public one, in which the presiding judge states the questions to be decided by the jury, separating the law from the fact in dispute, and submitting the issues so distinctly that there can be no question on what grounds the decision is to be based. This separation divides the responsibility between court and jury, and makes the share of each clear to all who attend the trial, thus securing that publicity of judicial proceedings which is one of the greatest safeguards of their purity. Where law and fact are passed upon together by a judge alone, or where a whole case is heard before referees, this exceedingly great advantage is much less completely obtained.

Moreover, a number of common men belonging to various walks in life are, in most cases, better fitted to decide correctly ordinary questions of fact than any single judge or bench of judges can be expected to be. Their experience is more diversified, their knowledge of common people and their affairs, of their feelings, interests, modes of thought, and conduct, is greater than that of a judge can be, and, consequently, their conclusions are more likely to be right. The freshness with which they approach their duties is no disadvantage. An old magistrate, long habituated to decide particular classes of cases, becomes set and biased in his views, acquires prejudices very difficult to overcome, however honest may be his intentions. On a point like this, one must necessarily appeal to experience. What lawyer has not known police judges who meant to do their duty, but who, from force of habit and anxiety to let no guilty man escape, reversed in their practice the presumption of innocence, and tacitly asked of every one who pleaded not guilty, "What are you here for, then?" We are firmly persuaded that the verdicts

of juries are, as a rule, more satisfactory to all concerned — parties, counsel, and intelligent observers — than the awards of arbitrators or referees.

When judges do decide serious controversies of fact, or are called upon to determine questions of discretion, they show themselves no less fallible than juries. At least, such has been the experience of the writer, who, after the chagrin and disappointment of defeat had passed away, has been less frequently, seriously, and permanently dissatisfied with the verdicts of juries than with the decisions of judges on similar points. One of the most important instances in which judges are called upon to exercise discretion is in the length of sentences to be imposed upon convicts. And here the inequality and want of anything like uniformity or consistency are notorious. Many years ago a judge of learning, experience, and unquestionable integrity, was heard to say, "*Prima facie*, I think it is the intention of the legislature to have the maximum sentence imposed for a crime; starting with that presumption, I look to see what mitigating circumstances there are in any particular case, and how much should be deducted on account of them." The worthy old gentleman manifested some sense of offended dignity when asked "if he imposed the highest sentence in common cases, what more there was left for him to do in aggravated and heinous ones."

Criminal lawyers often exhaust their ingenuity to prevent a client from coming up for sentence before a severe judge, and to have him sentenced by a more merciful one. We have heard of a judge who recalled a sentence just publicly announced, and increased the term of punishment a year, because the unhappy criminal ventured to say in open court that he preferred one prison to another. Judges have power, responsibility, and discretion enough, without throwing upon them the burden of discharging the functions of juries also. Such is believed to be the almost universal feeling of judges themselves. If a jury goes widely astray in its verdict, the error is remediable by granting a new trial, which, in plain and gross cases, a resolute and conscientious judge never hesitates to do. An error in point of law by a trial-judge may be corrected before an appellate tribunal. But what power can revise his discretionary and irresponsible decisions upon matters of fact? It is no unimportant consideration that trial by jury affords a double chance

to prevent injustice, since both court and jury must go wrong before it can be consummated.

It is sometimes said that juries are swayed unduly by the eloquence and misled by the plausible but sophistical arguments of unscrupulous advocates, and that on this account some other mode of trial would be preferable. But the last word heard in every jury trial, is the calm, impartial charge of the judge laying down the law, pointing out the real issues, sweeping away sophistries, summing up the evidence, and recalling the attention of the jury to their duty. Moreover, experience has shown that judges are sometimes as liable as jurymen to fall under the influence of particular counsel of commanding abilities and fascinating personal traits, and the case of a permanent judge thus controlled is far more mischievous than that of a transient jury, which is soon dispersed, and succeeded by others perhaps more independent.

Again, it is urged that there are certain large classes of cases in which juries are habitually biased in the same direction; that in suits for damages for torts, and in all kinds of actions against corporations, they notoriously incline to favor the plaintiff, and render verdicts for excessive amounts and upon inadequate evidence. The charge that juries are prone to award extravagant damages against corporations may well be denied. In actions for personal injuries there cannot possibly be any precise standard of damages. The value of a leg or arm, or injured spine, is incapable of being accurately expressed in money. Jurymen, judges, referees, and assessors in such cases, vary widely in their awards. The same sum of money does not mean the same thing to a farmer as to a city merchant accustomed to great transactions. A dollar looks much larger to one man than to another. No two cases of injury are alike. It may well be doubted whether referees or judges would assess unliquidated damages with more uniformity than juries. And the presiding judge can always order a verdict to be set aside unless the plaintiff consents to reduce the damages to a sum which, in his judgment, is not excessive. In extreme cases, where the amount seems clearly exorbitant, no just judge will refuse to exercise this power.

The assertion that juries in this class of cases find verdicts for plaintiffs upon inadequate evidence, is probably better founded. Here, also, it is to be borne in mind that the plaintiff must make out a *prima facie* case before he is entitled to go to

the jury; that there is always a preliminary question for the judge whether there is evidence sufficient to warrant a jury in finding for the plaintiff, and that if the trial-judge erroneously submits to a jury a case in which he ought to have directed a verdict for the defendant, or to have non-suited the plaintiff, his ruling in this regard may be reversed before an appellate court. With all these safeguards few very flagrant instances of improper verdicts allowed to stand would be expected. And the writer appeals to the *consensus* of opinion of judges and counsel whether the general results of such trials before juries are not as just and reasonable as would be likely to be secured by trials before judges, or committees, or referees.

There is, however, another view, not to be lost sight of, the practical importance of which is immense, but more easily felt than stated or logically justified. The object of the administration of the law is not to carry out inflexibly and unflinchingly the rules of inexorable logic, but to do substantial justice between parties. Human nature is not so constituted that it will long endure the rigid and unmitigated application of logical rules to the conduct of life in any direction. Law itself is never a pure science, but always a practical, applied science. And trial by jury in its essential principle is the right of the citizen to have the judgment of a free, impartial, and independent committee of his fellow-citizens upon the question of his guilt or innocence when accused of crime, and, in civil trials, upon any question of fact affecting his property or his pecuniary interests. One of its chief objects and most characteristic features is to "relieve against the procrustean application of legal technicalities." It is an institution invented to secure substantial justice, even by deviating occasionally from the strict application of artificial distinctions and logical rules. It rests upon the assumption that in the largest number of cases a satisfactory and just result will be reached, and the greatest good of the greatest number be promoted by intrusting the power of decision to a body of common citizens, casually selected from the community at large, without technical training or professional bias, and free from any sinister influences which may possibly affect permanent judges or officers belonging to a particular profession, and more in sympathy with the Government than with the people.

Now, the enormous and largely irresponsible power of great corporations is one of the most alarming facts connected with mod-

ern civilization. The managers of many of these huge organizations are believed to be to a great extent destitute of any adequate sense of their duties and obligations. They are accused of attempting to control judges and legislators, and of insolently and arrogantly trampling upon the rights of the people. But, though they fear not God, nor regard man, they stand in salutary awe of trial by jury. And the knowledge that they can be called to account before twelve common citizens is far the most effectual restraint to which they are subjected. When a board of railroad directors is considering whether to adopt some improved appliances—expensive, but increasing the safety of passengers; when steam-boat officers are hesitating whether to comply with the statutes as to their boilers, or boats, or the number of passengers allowed to be carried on a trip; or when insurance managers are deciding whether to attempt to insist upon some technical but dishonest defense—the knowledge that ultimately their conduct may be publicly exposed in a court, and passed in review before a jury, has a most wholesome influence. And the citizen who believes himself to have been injured, or his rights infringed, and his just demands insolently defied, although conscious of the immense disparity between his own strength and that of his soulless adversary, yet feels unspeakable consolation in the thought that at last twelve honest men will decide on his cause. We go farther, and say that the entire community derives from this knowledge a sense of security and a confidence that substantial justice will prevail, which it would not feel if any other mode of trial were to be substituted for the jury system. We do not believe that there is any large English-speaking community in the world that would ever consent to abandon the privilege, even in civil cases, or would submit to being deprived of it without forcible resistance.

But some horror-struck objecter may say: Would you have juries disregard their oath to decide according to the law and the evidence given them, and render verdicts against the weight of evidence in particular cases, from considerations of general utility and public policy? By no means. When, however, substantial justice is promoted and salutary examples are set, the effects of which produce far-reaching benefits to the community, the circumstance that such results are attained at the expense of occasional departures from the rigid application of legal and logical rules does not, to our mind, constitute a very impressive

argument in favor of abandoning a system cherished for so many centuries, and attended by advantages so valuable and so incapable of being replaced by any equivalent substitutes.

Thus far we have regarded trial by jury chiefly as a part of the judicial system. It remains to consider briefly its value as a political institution. This is the aspect which De Tocqueville regards as far the most important.

No pages in his unrivaled treatise are more instructive or more replete with wisdom than those in which he speaks of trial by jury in the United States, considered as a political institution. We resist the temptation to quote largely from them, for every sentence deserves the considerate attention of every one interested in this subject. Men are best fitted for freedom by the enjoyment of the privileges and the performance of the duties of free men. Free institutions in their practical operation are the best educators of the people. The town-meeting, the popular assembly, and the jury-room are the true schools in which to learn political wisdom and acquire the capacity for self-government. A man who sits on a jury is a participator in both the judicial and executive branches of the Government. He assists in deciding upon the rights of his fellow-citizens, and his verdict is one step toward the vindication of those rights. No honest and decent man can occupy such a position without feeling a sense of responsibility which will increase his personal dignity and self-respect; he cannot fail, in the course of the simplest trials, to learn a great deal. How often does one hear intelligent citizens speak of their experience as jurors as of life-long benefit to themselves! Indeed, it is so not only by giving them an insight into the working of the judicial system, but by increasing that solid good sense and sobriety of judgment which is promoted by nothing so much as by acting in important affairs under serious responsibility. Well might De Tocqueville say that "the practical intelligence and political good sense of the Americans is mainly attributed to the long use which they have made of the jury in civil cases."

The way of wisdom, then, is not to abolish, but to improve and elevate the jury system. Let social scientists and all good citizens direct their attention to securing proper jurors by further legal enactments where they are needed, and everywhere by the honest and faithful execution of existing laws. Let citizens drawn as jurors be made to feel that it is unpatriotic and dis-

graceful to shirk such a duty without the most cogent cause. Let any attempt to select jurymen in the interest of either of the parties, or to influence a juryman improperly, be carefully guarded against, and, when detected, severely punished.

Let it never be forgotten that a competent presiding judge is an essential requisite to every satisfactory jury trial; and therefore, let every effort be exerted to secure good magistrates by paying adequate salaries, by making their tenure of office permanent, and by adopting the best methods of selection and appointment. If these things are done, we see no reason why trial by jury should not hold its place for centuries to come, as it has for many centuries past, as one of the most valued and cherished institutions wherever constitutional liberty exists.

DWIGHT FOSTER.